REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

WESTERN DISTRICT:
ALEXANDRIA, OCTOBER, 1833.

BROWN *vs.* FRANTUM.

APPEAL FROM THE COURT OF THE SIXTH DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

A bequest was made of a tract of land "containing ten arpents front with the ordinary depth, to be laid off on the right hand side of bayou Bœuf, descending at a small distance below Robinett's line at a gully." It was proved there was no gully below R's. line, but there was one five arpents above it. Held as there is no gully below the line, the line must be taken as the boundary; and that the intention of the donor cannot be defeated by such an error as to the situation of the gully.

The right acquired by each of two purchasers of the same tract of land from the same vendor, the title of either of whom requires for its validity as to third persons, only a due registry before the other, is a subject of sale or legacy.

A. and B. verbally agreed that one might sell any part of the other's land, and the other was bound to approve the location. A. had sold a certain quantity of B's. land, and it was held that B. might bequeath the same quantity of A's. land.

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A verbal agreement for land or slaves is not null and void; its defect relates solely to the proof; and if one of the parties acknowledge the agreement, or permits parol evidence of it to be given without opposition, the agreement will be carried into effect.

Confirmative acts dispense with the exhibition of the primordial title when its tenor is therein specially set out.

Where the heirs of a testator acquire a title in that quality to property in consequence of a right existing in their ancestor at the time of his death, and which right he had made the subject of a legacy, the title so acquired accrues to the benefit of the legatee.

A mandatary under a special power must confine himself strictly within the limits assigned to him, and those dealing with him must at their peril see that he does not exceed his authority; but they need not, in search of his powers and their limitations, look beyond the instrument of mandate.

A declaration that the vendee is acquainted with the title, means that he has a knowledge of the title under which his vendor acquired the property, but not he knows the vendor has divested himself of that title.

The plaintiff sues for a tract of land on bayou Bœuf, containing ten arpents front by forty, being part of the Indian purchase, and set apart in the division to Samuel L. Wells, and by him divised to his son Willis, who sold it and conveyed it to the plaintiff's late husband. She prays to be restored to possession and quieted in her title.

The defendant sets up title and pleads the prescription of ten years in pursuance of uninterrupted possession under a good title.

The plaintiff derives her title from the following clause in the last will and testament of S. Levi Wells, made in 1815. "I give and bequeath to William Wells, &c., a tract of land containing ten arpents front with the ordinary depth, to be laid off on the right hand side of bayou Bœuf descending, a small distance below Robinett's line, &c." Willis Wells sold and conveyed this land to Hugh Brown, late husband of the plaintiff. *Vide* 3 *La. Rep.* 128.

PORTER, J., delivered the opinion of the court.

This is a petitory action. The plaintiff claims ten arpents of land in front on the right bank of bayou Bœuf, embraced within the limit of the purchase made by Millar and Fulton of three tribes of Indians, an acquisition which has been fruitful of much litigation. In the present case both parties claim under persons who were partners or joint proprietors of the lands sold to the persons just mentioned.

The plaintiff's title must be first examined. She claims under Levi Wells, who was admitted by Millar and Fulton to share with them in the purchase which they made of the Indians, and mediately of Millar, from whom she alleges Wells acquired the *locus in quo*.

Sometime after the sale from the Indians, Millar, Fulton, Wells, and Clarke, proceeded to make a survey of the premises, and to lay off the portion each was entitled to. The facts relating to this transaction, are circumstantially detailed in the case of *Compton* vs. *Mathews*, and need not be repeated here, 3 *La. Rep.* 28.

It is proved by parol evidence, that an agreement not reduced to writing, existed between Millar and Wells, that in case either of them sold lands within the limits assigned to the other, that the same quantity should be given out of the portion of the vendor in lieu thereof. This statement is made in the belief that it is justified by the proofs in the cause. The objections made to its correctness will be noticed hereafter.

In pursuance thereof, Millar sold land within the limits of the land set apart to Wells, and on the 28th of May, 1815, Wells, by last will and testament, bequeathed to his natural son Willis Wells, ten arpents of land, embraced by the portion which fell to Millar in the original partition. The description given to this legacy in the will is in the words, "I give and bequeath to Willis Wells, and his heirs and assigns for ever, a tract of land containing ten arpents front with the ordinary depth, to be laid off on the right hand

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side of bayou Bœuf, descending, at a small distance below Robinett's line, at a gully."

Subsequent to the execution of this testament, and previous to the month of April, 1820, Millar gave a power of attorney to one Scott, to relinquish to the heirs of Wells his right to so much land within the limits of his part of the Indian purchase, as would be equivalent to the quantity he had sold within the portion of their father. As the power conferred by this mandate, has been the subject of much contest at the bar, and as a true understanding of it, has an important influence on the rights of the parties now before us, it is proper to set it out at length. What follows is a copy of that given in evidence.

"Know all men by these presents, that whereas, William Millar and Levi Wells, in his life time, held each a portion of the land purchased of the Chocto, Pascagoula, and Biloxi Indians, situated on the bayou Bœuf, in the parish of Rapides, and whereas, the lines were not ascertained, and whereas, it was understood that William Millar might dispose of certain lands at designated places, particularly to Clements and Gardner, upon his conveying to the said Wells as much land as should appear to belong to the said Wells when the lines should be new and the quantity ascertained. Now, therefore, I William Millar, do by these presents, constitute and appoint Thomas C. Scott, my true and lawful attorney for this special purpose, to convey to the heirs of Levi Wells as much land out of my claim as shall appear to fall within their lines which I have sold, but without any warranty: and I will warrant what he shall do in the premises."

On the 17th April, 1820, the agent thus appointed, and the heirs of Levi Wells, passed an act which was duly recorded in the office of the parish judge of the parish of Rapides, where the land now in dispute is situated. By this act the attorney of Millar relinquished to the heirs of Wells, thirty-seven arpents in front to begin on the lower corner of a tract of land belonging to the estate of Levi Wells, thence down the bayou, descending. It is expressed that the

relinquishment is made without warranty, for any defect in the title, or dimunition of the land, the purchasers acknowledging themselves to be well acquainted with the title and satisfied therewith. On the other part, the heirs of Wells relinquish to Millar the title to ten arpents in front, sold by him to Gardner, and twenty-seven arpents in front sold to Clements. At the close of the instrument the following clause is found, "for a more full explanation of this sale or exchange reference is made to the power of attorney of William Millar hereto annexed." That power has been already set out.

Willis Wells, the legatee of Levi Wells, sold the ten arpents in front bequeathed to him, to the husband of the plaintiff. Under this purchase, she in her own right, and as her representative of the heirs of her husband, claims the *locus in quo*.

The defendant's pretensions rest on a sale made by Millar to Daniel Clarke, on the 19th March, 1812. The instrument was executed before Pierre Pedescleaux, a notary public of New-Orleans, and conveys twenty-five arpents of land on the front of the bayou Bœuf, with the depth which may be found, bounded above by lands of Levi Wells, and below by those of the vendor. This sale was prior in point of time to the bequest made by Wells in his will, and to the relinquishment made on the part of Millar of the land so bequeathed, but it never was recorded in the parish where the property is situated. A great deal has been said on the part of the plaintiff, in regard to the true location of the land which passed by this conveyance, and it has been strenuously contended, that it was contemplated to convey premises lying at a great distance from the place now in dispute. On the part of the defendant it has also been seriously urged, that the relinquishment on the part of Millar does not embrace the *locus in quo*. Neither of these objections appears to us well founded. The evidence satisfies us, that both conveyances cover the contested land, and that the case must be decided on the strength of the respective titles.

The first ground taken in opposition by the plaintiff's

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title, is the want of identity between the land bequeathed to Willis Wells, and that now sued for. This objection rests principally, if not solely, on a fact proved in evidence, that there is no *gully* between Robinett's line, but that there is one five arpents above it, and that a gully a small distance below the line of Robinett is given in the will of the testator as the boundary. By an article of our old code in force at the time the testament was made, and at the time it was opened, it is provided, that "if any obscurity be found in the meaning, or the terms of the disposition, either as to the person to whom it is made, *or as to the thing bequeathed*, the judge must endeavor to discover what was the intention of the donor. If then there be no *gully* below the line, we must take that line as the boundary. It is clear the intention of the donor was to give ten arpents of land, and the intention cannot be defeated by an error as to the situation of the *gully*, more especially as we have another limit which enables us to give the bequest a specific location. *C. Code*, 253, *art.* 200.

A bequest of a tract of land "containing ten arpents front with the ordinary depth, to be laid off on the right hand side of bayou Bœuf descending, at a small distance below Robinett's line at a gully." It was proved there was no gully below R's line, but there was one five arpents above it. Held as here is no no gully below the line, the line must be taken as the boundary; and that the intention of the donor cannot be defeated by such an error as to the situation of the gully.

It is next objected that the gift to Willis Wells is null and void, because by a positive provision of our code, the legacy which is made of the property of an other is declared to be so, whether the testator knew the fact or was ignorant of it. In the application of this principle of law to the case before us, it is urged, that at the time and before Wells bequeathed the land to his son, Millar had already sold it to Clarke. It was consequently Clarke's property, and could not be the subject of a testamentary disposition in Wells' will. This argument overlooks the familiar doctrine of our law that the purchaser of real estate may be the owner *quoad* the vendor, and that he is not so in relation to third persons who may acquire a real right into or on the thing, until his contract is duly registered in the parish where the property is situated. Our law declares that the sale of the property of another is null and void, and yet nothing is more common than that the second vendee who *bona fide* buys, and records his title, holds the object bought in preference to a previous purchaser who neglects this formality. In such a case there-

The right, acquired by each of two purchasers of the same tract of land from the same vendor, the title of either of whom requires for its validity as to third persons, only a due registry before the other, is a subject of sale or legacy.

fore, both are owners in relation to their vendor, and either may become so as it respects all other persons by duly enregistering his contract. This right may in our opinion be the subject of a sale or of a legacy. Any other construction would lead to a curious result. If the party lived and recorded his deed first, he would become the owner. And if he died his heirs could not do the same thing, and with the same result. Yet, if he gave it as a legacy, his title was destroyed, because it was the property of another! But if it was the property of another, in the sense contended for, how could it become that of the party who recorded, by an act which surely proceeded from him? *O. Code*, 240, *art.* 147, *ibid.* 348, *art.* 20.

This brings us to the inquiry whether at the time Levi Wells made his will, he had such a right in the land, as enabled him, in case that right was subsequently evidenced by a written act duly registered, to hold the property. It is in evidence that a parol agreement existed between Millar and Wells, that if a buyer from either should be located within the portion of the *Indian purchase* set apart to the other, they would approve of the location and take in lieu thereof the same quantity of land within the limits belonging to the vendor. In other words they agreed to exchange lands in case the contingency contemplated should occur. That contingency had happened before Wells made his will, and before Millar sold to Clarke. In the years 1809 and 1810, Millar sold one tract of land to Gardner, and an other to Clements, both of which he located within the portion that belonged to Wells. These sales gave to Wells a right to take the same quantity within the part which had fallen to Millar in the partition. But it is urged the choice of the land out of which the reimbursement was to be made, belonged to Millar, and that Wells could not select a particular spot, and make it either the object of a sale, or gift. In looking into the correctness of the position, it is unnecessary to inquire in whom the right of selection would be vested, under a contract where the owner agreed to sell an indefinite part of a larger tract of land for a sum of money. The contract before us must be

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carried into effect, according to the intention of the parties, as fairly deduced from the stipulations made by them. The construction contended for would violate that intention, as we understand it, would cause great unequality in the rights of those who contracted, and might have worked gross injustice. The agreement as proved, proceeds on the idea that one of the parties might sell *any* part of the land belonging to the other, and the party whose land was thus sold, was bound to approve the location. Reciprocity, therefore, required that the same latitude of choice should be given to the party who was to be reimbursed. Wells might, in the first instance, have sold any part of Millar's tract, and his authority to do so, was certainly not diminished by Millar having previously sold within his, Well's, portion. Any other construction would give an undue advantage to the party who first exercised the right which the agreement conferred. If this matter was doubtful, which it is not, we have the construction given to the contract by one of the parties, with the express consent of the other to do away that doubt. Wells did dispose of land of Millar according to Well's choice, and Millar subsequently ratified it. We therefore think that at the time Wells made his will, he had a right to any portion of Millar's tract equal in quantity to that which the latter had sold in the portion belonging to him.

A. and B. verbally agreed that one might sell any part of the other's land and the other was bound to approve the location; A had sold a certain quantity of B's land, it was held that that B might bequeath the same quantity of A's land.

But it is further objected that the interest shown to exist in Wells to the land, which enabled him to make it the object of a legacy, is proved only by parol evidence, that his contract was not reduced to writing, and that it was null and void. This court has repeatedly decided that a verbal agreement for land or slaves, even under the provisions of our code was not null and void. That the defect which such a contract presented, related solely to the proof, and if one of the parties acknowledged the agreement, or permitted parol evidence to be given of it without opposition, it was the duty of a court of justice to carry it into effect. Here we have written proof from the vendor that such a parol agreement did exist. The conveyance of the agent of Millar under the

A verbal agreement for the sale of land or slaves is not null and void, its defect relates solely to the proof; and if one of the parties acknowledges the agreement or permits parol evidence of it to be given without opposition, the agreement will be carried into effect.

power of attorney, expressly recognises it. This conveyance is not a new contract as was contended in argument, it is based on, and recognitive of an agreement previously existing, and confirmative acts dispense with the exhibition of the primordial title when its tenor is specially set forth. In this instance Millar's power of attorney states the agreement which had existed, and the conveyance of the agent refers to that power for a more ample explanation of the act passed by him. *O. Code*, 308, *art.* 237.

Confirmative acts dispense with the exhibition of the primordial title when its tenor is therein specially set forth.

It is next urged that the confirmation made by Millar to the heirs of Wells enured to their benefit, and not to that of the legatee. We have some doubt whether this objection can be made by a third party against him who is in possession under the will. But we have no doubt that when the heirs of a testator, acquire a title in that quality to property, in consequence of a right existing in their curator at the time of his death, and which right he had made the subject of a legacy, that the title so acquired, enures to the benefit of the legatee, because it was the duty of the heirs to carry the will into effect. *O. Code*, 240, *arts.* 141 and 142.

Where the heirs of a testator acquire a title in that quality to property, in consequence of a right existing in their ancestor at the time of his death, and which right he had made the subject of a legacy; the title so acquired enures to the benefit of the legatee.

This brings us to the last point of importance in the cause, viz: the want of authority in Millar's attorney to convey to the heirs of Wells the *locus in quo*. The power has been already set out. It authorises the agent to convey the same quantity of land within Millar's claim, which Millar may have sold out of Wells'. It is urged that it never could have been in the contemplation of the principal to have confered authority on his agent to convey to the heirs of Wells, lands which had already been alienated to Clarke, and thus make him responsible in damages. This we readily believe. Authorities have been cited to us, that mandataries under a special power must confine themselves strictly within the limits assigned to them, and that those who deal with them must at their peril see they do not exceed their authority. To which doctrine we also accede. But this doctrine like every other must be applied with these limitations which, necessarily, belong to it. It is true the party contracting must at his peril see the agent does not exceed his authority, but

A mandatary under a special power must confine himself strictly within the limits assigned to him, and those dealing with him must at their peril see that he does not exceed his authority: but they need not in search of his powers and their limitations look beyond the instrument of mandate.

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A declaration that the vendee is acquainted with the title, means that he has a knowledge of the title under which his vendor acquired the property, but not he knows the vendor has divested himself of that title.

how is he to see and judge of that in the case of an expr authority conferred, save by an examination of the writ instrument which gives it. He has a right to believe t all the limitations which it was intended to place on t mandatary, would be there expressed. He is not compel to look beyond it. He is not obliged to inquire, whet there may not be facts and circumstances which should h induced the principal to place restrictions on the authori which he has conferred. The law does not presume, and does not require of the third person to suspect that any su exist; such a doctrine would put it in the power of prin pals to entrap every one who deal with their agents, a place every one who contracted with them at their mer A power of attorney is to be construed by courts, like ev other instrument. It should receive such an interpre tion as fairly results from the language used, when con dered in relation to the subject matter. And when it examined in that view and it leads to the conclusion, that t agent and the other party were both justified in beleiving authorised the contract, relief cannot be obtained against because facts existed which should have induced the prin pal to place limitations on the power granted. In the presen instance authority was conferred to convey out of the lan which the principal had acquired from the Pascagoul Chocto and Beloxi tribes of Indians, a sufficient quantity replace those which the principal had sold belonging Wells. The agent is confined to no particular portion, limited to any part of the tract. The whole is placed und his authority. If a stranger under such a power had pu chased the thirty-seven arpents conveyed to the heirs Wells, a question could hardly be raised, that he h acquired a good title, and we see nothing in the facts of t case which would authorise us to place them on a differe footing. It has indeed been argued that in consequence their acquiring without warranty, and their declaration th they were well acquainted with the title which Millar h to the premises, that they cannot now say, they were unac quainted with the sale to Clarke. But the court cannot

sent to this reasoning. It extends the meaning of the expressions further in an opinion than they warrant, and beyond the intention of the parties. A declaration that the vendee is acquainted with the title, means that he has a knowledge of the title, under which his vendor holds the property; not that he has a dnowledge the vendor has divested himself of that title.

The objections made to the plaintiff's title being removed, the case is one of the utmost simplicity and clearness. The conveyance under which the plaintiff 's claims the premises, though last made, was first recorded in the parish where the land lies, and must prevail.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed, and it is further decreed, that the plaintiff do recover of the defendant the premises claimed in the petition, with costs in both courts.

Rigg and *Winn*, for plaintiff and appellant.

Janin and *Boyce*, for defendant and appellee.

HALL *vs.* MARSHALL.

APPEAL FROM THE COURT OF THE SIXTH DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

Where the petition claims section No. 27, and the evidence shows that the land occupied by the defendant, is No. 28, the plaintiff will be precluded under the pleadings, from showing title to No. 28, and a judgment of non-suit entered.

The circumstance of the defendant setting up title to sections 27 and 28, in his answer, will not authorise testimony to prove title to land not claimed in the petition.

The plaintiff claims to be the owner of section 27, in a certain township of land, which he purchased at the probate

sale of the estate of one Thomas Broderick, by the parish judge of Avoyelle, in 1827. He alleges the defendant has taken wrongful possession of it, and sets up adverse title thereto.

The defendant avers, that the proceedings of the probate judge were illegal, and that at the sale, the plaintiff, who is the brother-in-law of John Stafford, the curator of Broderick's succession, purchased the premises for the use and benefit of the latter. That said purchase is null and void in law, as having been made indirectly by the curator, which is forbidden. He claims title through one Reuben Ray, to whom Broderick sold his inchoate rights in his life time; and also all Stafford's right to the same land, under a sheriff's sale, and several mesne conveyances.

It was disclosed in evidence, that the section of land claimed, was No. 28, and not 27, as alleged in the petition. The defendant had judgment, and the plaintiff appealed.

PORTER, J., delivered the opinion of the court.

This is a petitory action. The plaintiff claims section 27, in township No. 1, south of the 31st degree of latitude, in range No. 2, east of the basis meridian, under a settlement made by one Thomas Broderick, deceased, which he avers entitles him to a pre-emption.

Where the petition claims section No. 27, and the evidence shows that the land occupied by the defendant, is No. 28, the plaintiff will be precluded under the pleadings, from showing title to No. 28, and a judgment of non-suit entered.

The circumstance of the defendant setting up title to sections 27 and 28 in his answer, will not authorise testimony to prove title to land not claimed in the petition.

The evidence show that the land occupied and claimed by the defendant, is section 28, and they objected to the plaintiff's right, under the pleadings, to show any title to that section.

We think the objection was well taken and that the evidence should not have been received. The plaintiff contends that he had a right to offer the proof, because the defendant in his answer set up a right to both sections 27 and 28, but the assertion of title to land, not claimed in the petition, formed no issue on which evidence could be received.

The judgment of the court below is final, we think it should be one of non-suit.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and it is further ordered, that there be judgment for defendant, as in case of non-suit, with costs in the court below, those of appeal to be borne by the appellee.

Flint, for the plaintiff. *Winn, contra.*

GRUBB'S HEIRS *vs.* HENDERSON.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF RAPIDES.

A will cannot be annulled, or its validity inquired into, without making those having an interest arising under it, parties to the suit.

In a suit between the heirs of an estate and the executor, the court cannot decree certain notes, found in the succession, but payable to the testator's natural children, to be the property of the plaintiffs, without making the payees of the notes parties to the suit.

A court of ordinary jurisdiction, is the proper tribunal in which to enforce the payment of debts due to a succession.

The facts are fully stated in the opinion of the court, delivered by PORTER, J.

The petitioners state that their uncle died in the parish of Rapides, leaving no descendants to inherit his estate; that they are his heirs; that after his death an inventory and appraisement of his property was made, and that one Francis Henderson administered his estate as one of his executors.

They pray that he may be cited, and adjudged to pay the sums which he may be found owing to the succession of the deceased in his own right, or otherwise, together with interest, as mentioned in the inventory; that a final settlement of

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the account of the succession may take place, and that he be decreed to surrender such portions of the property as is not disposed of.

On this petition the judge made an order, admitting the plaintiffs, as heirs of the deceased, and directed the executor to render his account.

The answer of the defendant, denied that there was such affinity between his testator, and the plaintiffs, as made them his heirs at law.

And that if they were, the deceased made a will, whereby he bequeathed to his own children all the estate; that this will is still in existence, and that the plaintiffs had no right to this action until the will was annulled, that the defendant was made executor of the will, and is tutor to the minor children of the testator. He also pleaded that he had disbursed large sums of money for and in behalf of Grubbs and his children, which he should be allowed in compensation.

And further, that the notes given by him for the land bought from B. Grubbs, were made in favor of his children, to whom alone he ought to pay them.

After this answer was put in, the plaintiffs applied for and obtained leave of the court, to file a supplemental petition, in which they state: That the will alluded to in defendants answer, never has been legally probated; that it is void for many reasons. That it was defective in wanting the requisites prescribed by law; that the dispositions made in it, are in direct opposition to law.

First. In making an universal donation to the concubine of the deceased.

Second. In donating more than is allowed by law to his illegitimate children, who had not been naturalized or acknowledged according to law.

Wherefore, they pray that the instrument alleged to be a will, be declared null and void.

The executor afterwards filed his account of disbursements as executor, leaving it to the court to charge him with such parts of the estate as he might be responsible for. He reiterated his allegation, that the will was good, and must be considered such, until set aside according to law.

The plaintiffs filed opposition to several items of this account; and averred that the defendant, not having paid many of the sums for which he claimed credit, during the period of his executorship, could not oppose them to the demand of the plaintiffs, and further, that the defendant had given the estate credit for no sum whatever, when he should have charged himself with thirty thousand dollars under the inventory.

On these issues the parties went to trial. The Court of Probates, sustaining the objections to some of the items of the defendant's account, came to the conclusion, that the estate was indebted to him in the sum of one thousand two hundred and twenty dollars and eight cents. It is further ordered, that the defendant deliver over to the plaintiffs, the notes made by him in favor of the natural children, but that nothing contained in the decree, should prejudice the rights of the plaintiffs to any action which they might bring on the note of the defendant.

From this judgment the plaintiffs appealed.

The evidence on record, does not enable us to say, the court erred in the decision which it made on the several items of the defendants account, which were objected to.

A will cannot be annulled, or its validity inquired into, without making those having an interest arising under it, parties to the suit.

The will could not be annulled, without making those having an interest under it, parties to the suit. *La Valsain* vs. *Cleretier*. 3 *La. Reports*, 170.

The principal point in contest, is in relation to the notes executed by the defendant, in favor of the illigitimate children of the testator, the consideration of which was a tract of land purchased from him. The plaintiffs contend that these notes were absolutely null and void, and that the judgment of the court should have been, that they were the property of the heirs, and that the defendant should pay over to the plaintiffs the amount due by them. The defendant has not appealed, and we are therefore dispensed with the necessity of examining whether the Court of Probates could give such a decree, in a case where the payees of the note were not parties, either by themselves, or their legal representatives; or if there had been such parties, whether that court

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RICHARDSON *vs.* SCOTT ET AL.

In a suit between the heirs of an estate and the executor, the court cannot decree certain notes found in the succession, but payable to the testator's natural children, to be the property of the plaintiff's, without making the payees of the notes parties to the suit.

A court of ordinary jurisdiction, is the proper tribunal in which to enforce the payment of debts due to a succession.

had jurisdiction of the case. We are however entirely satisfied, that the prayer on the part of the plaintiffs to have the judgment made still more favorable to them, cannot be acceeded to. The payees of the notes are not parties to this suit, and no judgment can be given which deprives them of the interest vested in them, by the terms in which the obligations are written, until they have had the means legally given to them, of making their defence. Then again, the debt due by the executor to the testator, previous to his decease, cannot be distinguished from any other credit, which the estate may possess, and the courts of ordinary jurisdiction, not those of probate, are the proper tribunals to enforce the payment of debts due to a succession.

This opinion renders it unnecessary to notice the bill of exceptions, which appears on record, and it is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed with costs.

RICHARDSON *vs.* SCOTT ET AL.

APPEAL FROM THE SEVENTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

In an exclusively possessory action, neither party is permitted to introduce evidence of title; an exception to this rule would probably take place in a case where the *extent* of possession was disputed.

The proceedings before a justice of the peace to oust a possessor of the contested premises, is evidence in a possessory action, to regain possession, *i. e.* to establish *rem ipsam*.

The lessor has a right under the acts of March 3d, 1819, to sue for the recovery of the possession of his leased property, under the jurisdiction of a justice of the peace.

And if judgment is obtained, and possession in pursuance of it, the inquiry will not be allowed, whether or not the proper formalities were complied with in obtaining judgment, if the justice had jurisdiction *rationæ materiæ*.

Where a tenant, on being required to surrender his lease, to evade his landlord, puts another in possession, such an act is directly *in fraudem legis*, and the possessor is considered as without any right or claim to the possession.

This is a possessory action. The plaintiff is the widow of R. D. Richardson, deceased, and claims the possession of the plantation and slaves, on which her husband died, and of which she alleges she had the possession, until forcibly ejected by the defendants.

The defendants filed separate answers; both denying possession to be in the plaintiff. Scott pleaded actual possession of the disputed premises; and Hook pleaded that he was in possession of them as Scott's agent.

The plaintiff had judgment, and the defendants appealed.

MATHEWS, J., delivered the opinion of the court.

This is a possessory action, commenced by the plaintiff, in her own right, and as natural tutrix of her children, who are minors, to recover possession of a certain plantation or tract of land, and slaves thereon, &c., situated in the parish of Ouachita, from which the petitioner alleges that she had been wrongfully and forcibly ousted or removed by the defendants.

They separated in their answers; the right of possession in the plaintiff is denied by both; Scott pleads legal and actual possession in himself at the time of instituting the present action; and Hook alleges that he obtained possession lawfully, as Scott's agent, &c.

Judgment was rendered in the court below in favor of the plaintiff, from which the defendants appealed.

The facts of the case, as they appear on the record, are established by testimony of witnesses taken down in writing, and by written documents. The latter were generally excluded from the evidence by the court below, in rendering its judgment, and are all brought up to this court under bills

of exceptions. They consist of muniments of title, and a record of a suit prosecuted to judgment and execution on the part of the defendant Scott, against one Hamblin, who, as alleged in the petition by which that action was commenced, had obtained possession of the premises now in dispute, in June, 1830, from a certain R. D. Richardson, who held the property at that time, for the plaintiff in that suit.

The proceedings in that case were commenced and carried on before a justice of the peace, in pursuance of the provisions of an act of the legislature, respecting landlords and tenants, approved on the 3d of March, 1819.

The present being exclusively a possessory action, it is believed, according to the article 53d of the Code of Practice, that the judge *a quo* did not err in refusing to admit evidence of title in either party to the suit. An exception to the rule established by this article of the Code, would probably take place in a case where the extent of possession was disputed; for, in such a case, the introduction of title papers might become necessary to show how far the right of possession, either civil or natural, or both combined, might legally extend over a tract of land, the possession of which was disputed. But no contest of this nature seems to have arisen in the present case. See in relation to this part of the cause, 7 *Martin*, *p.* 486.

In an exclusively possessory action, neither party is permitted to introduce evidence of title; an exception to this rule would probably take place in a case where the *extent* of possession was disputed.

As the proceedings had before the justice of the peace, relate entirely to possession, we are of opinion that they were properly admitted, so far as they were allowed to be evidence to establish his *rem ipsam*. The legal effect of this evidence on the rights and claims of the parties, is a matter different from its admissibility.

The proceedings before a justice of the peace, to oust a possessor of the contested premises, is evidence in a possessory action, to regain possession, *i. e.* to establish *rem ipsam*.

The testimonial proof, although somewhat contradictory, together with the copy of a letter, written to Scott, by R. D. Richardson, the husband of the plaintiff, and father of her children, whom she now represents, as tutrix, which is part of the evidence contained in the record, purporting to have been dated on the 1st of April, 1830, establish the fact

pretty clearly, that the writer never possessed the premises in dispute in his own right, but as tenant, holding for Scott. There is no evidence to show that the tenant could ever consistently have joined the will to possess for himself or in his own right, to the actual detention of the property. His possession was, therefore, according to legal principles, the civil possession of the defendant, Scott. See *La. Code*, from *art.* 3389, to *art.* 3402.

MATHEWS, J., delivered the opinon of the court.

The whole evidence of the case, stripped as it is, of all documents relating to the title, shows that Richardson held possession of the premises in dispute, for Scott, until some time in June, 1830; that they were then let to Dr. Hamblin, on a lease, which was to expire on the 1st of January, 1831, or so soon thereafter as he could gather the crop, which grew on the plantation in 1830; and that Richardson died in July of this year, 1830, leaving the plaintiff, his widow, and two children, of whom she is tutrix, who left the plantation, and did not return to it until January, 1831.

Now it is clear that Richardson, the husband and father, not having possessed in his own right, had acquired no right of possession before or at the time of his death, and consequently could transmit no such right to his widow and heirs. If Scott, either by himself or his agent, Hook, had peaceably entered into, or recovered actual possession from Hamblin, his tenant, under the lease from Richardson, at the expiration of that lease, the pretentions of the plaintiff in the present suit, would be wholly without foundation.

But it is contended on one part, that, even admitting that she had no right of possession, or was not a person entitled to bring a possessory action, according to the 47th article of the Code of Practice, yet being one evicted by force, she is legally authorised to maintain the present suit, according to a proviso of the 49th article, wherein it is declared that a possession of less than one year, in case the possessor has

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been evicted by force or fraud, will authorise an action to recover possession. This leads us to the consideration of the proceedings commenced and carried on before the justice of the peace.

Consid ring Hamblin either as the immediate or sub-lessee of Scott, (and as standing in one or the other of these situations, he must be considered according to the evidence of the cause,) the lessor had a right, under the act of 1819, to pursue for recovery of the possession of his property, under the jurisdiction of a justice of the peace. He did so, and obtained a judgment, and it is not for us to inquire, whether or not proper formalities were complied with, in the prosecution of his claim; it is enough that the justice had jurisdiction *ratione materiæ*.

The lessor has a right, under the acts of March 3d, 1819, to sue for the recovery of the possession of his leased property, under the jurisdiction of a justice of the peace.

And if judgment is obtained, and possession in pursuance of it, the inquiry will not be allowed, whether or not the proper formalities were complied with in obtaining judgment, if the justice had jurisdiction *ratione materiæ*.

Previous, however, to the execution of this judgment, the tenant had given up possession to the plaintiff. This we view as an act intended to evade the law; it is directly *in fraudem legis*, and ought not to be tolerated by courts of justice; otherwise the provisions of the act relating to landlords and tenants, would become vain and nugatory. The plaintiff, at the time she was removed from the premises, stood in a situation no better than a person would be in who should take possession of a house and plantation from which the owner was temporarily absent on business, or any other occasion. She must be considered as an intruder or usurper, without a shadow of claim. A system of jurisprudence which would authorise a person thus deprived, to recover possession against the rightful owner, having the right of possession, would, in our opinion, violate all sound rules and principles, on which the rights of property are founded. We conclude that the proviso of the 49th article of the Code of Practice is not applicable to the present case, and that the defendants did not obtain possession either by illegal force or fraud.

Where a tenant, on being required to surrender his lease, to evade his landlord, puts another in possession, such an act is directly *in fraudem legis*, and the possessor is considered as without any right or claim to the possession.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided, reversed and

annulled. And it is further ordered, adjudged and decreed, that judgment be here rendered for the appellants and defendants, with costs in both courts.

SPRIGG vs. BEAMAN.

APPEAL FROM THE COURT OF THE SIXTH DISTRICT, THE JUDGE OF THE FOURTH PRESIDING.

In an hypothecary action, the defendant cannot, after the general denial has been pleaded in the court of the first instance, first raise the objection on appeal, that the oath as to the debt is not annexed to the plaintiff's petition, and that payment has been in vain demanded, thirty days before the institution of the suit.

A surety who pays and is subrogated to the rights of the creditor against the principal debtor may legally issue execution in the name of the judgment creditor.

Personal demand on the debtor, previous to bringing the hypothecary action against the third possessor, will not be required where the debtor has absconded. A return by the sheriff of *nulla bona*, is sufficient.

In the assignment of a judgment the legal and the express subrogation are of equal extent, and every right which the creditor possessed, passes by the act of payment to him by whom that payment is made.

An attorney interrogated as a witness in a cause upon his *voir dire*, swore "that he had not stipulated any particular fee, but expected to be paid for his legal services, and that it was his habit, when he had not stipulated for his fee to charge less, should he fail in the cause than if he were to succeed; and that he would feel bound by his rule of conduct to apply it in this case." It was held by the court that he was admissible as a witness, for his client.

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A debtor, who is liable in warranty, if the plaintiff succeed against his vendee, has a direct and legal interest, which renders him incompetent to testify in the cause.

The authority to collect a note, necessarily implies the power to extinguish the right of the creditor in it, and whether the payment by which this extinction is produced, be made by the debtor or any other person, is a matter of no importance, provided that the attorney expressly stipulates, that the transfer is made without recourse to his client.

The word "rights," in *Louisiana Code, art.* 2156, embraces every thing included in the following words, "actions, privileges and mortgages."

If an absolute judgment be rendered when the petition prays only for a conditional one, it is good ground for reversal.

This was an hypothecary action brought to subject certain slaves in the hands of the defendant, as third possessor, to the plaintiff's mortgage. The latter derives his mortgage from a recorded judgment obtained by one James Miller against G. C. Russell, at the May term of the Rapides District Court in 1829. In December, 1828, Miller, by his attorney at law, and in fact, Isaac Thomas, for value received, transferred said judgment with all its privileges and mortgages to the petitioner. Since the recording and transfer of the above judgment, the defendant purchased a number of slaves at sheriff's sale, sold as the property of G. C. Russell, and subject to the mortgage under said judgment.

The defendant expressly denied the authority of Mr. Thomas, as the attorney in fact of Miller, to transfer his judgment against Russell to Sprigg, and subrogate the latter to Miller's right, privileges and mortgages under the judgment. He averred that Miller was dead when the transfer was made, and the power under which it was made, was insufficient; and that it was made in fraud and without consideration.

The power of attorney from Miller to Thomas, declares that "I, James Miller, &c., do nominate and appoint Isaac Thomas, my attorney in fact; with full power to arrange,

settle and receive the amount of a claim due me by G. C. Russell, and which is at this time in the hands of my said attorney; hereby clothing him with full power to do any thing in relation to said claim that he may think proper, or take any steps for the security therefore."

On the trial, I. Thomas, Esq., was called as a witness, and objected to on the score of interest; having a fee in the case as counsel.

It was also objected by defendant, that the return of the sheriff of *nulla bona*, on the execution against Russell, was sufficient notice to the third possessor, of the non-payment of the debt; and that the execution, itself, was null, having been issued by the assignee in the name of the judgment creditor.

The district judge overruled all these objections, and gave judgment for the plaintiff's whole claim. The defendant appealed.

Thomas, for plaintiff and appellee.

1. The main question here, is whether the power of attorney from Miller, was sufficient to transfer all his rights to this judgment against Russell?

2. The power is full and ample to his attorney to secure the payment of the debt in any lawful way, and makes the subrogation legal. It was special, because it related to the set t ement of this particular debt.

3. The objection to counsel being sworn as witnesses in their causes, cannot be sustained. The code makes them competent witnesses, and the taking a fee does not disqualify them.

Winn, for defendant and appellant.

1. This being an hypothecary action, is improperly brought, because there is no oath annexed, that the debt is due and remains unpaid, and that payment has in vain been demanded of the principal debtor thirty days before suit against the third possessor. *La. Code*, 3364, 5. *Code of Practice*, 68, 69, 70.

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2. The surety who pays the debt, cannot take out execution in the name of the creditor; so the *fi. fa.* issued by Sprigg in Miller's name, against Russell, was null and void, and the sheriff's return of *nulla bona* was illegal, and did not operate a notice of a demand on the original debtor, to put the third possessor in delay. 4 *Mar. N. S.* 196. *Code of Practice*, 726, 7. 1 *La. Rep.* 410.

3. The transfer of the judgment and subrogation of Sprigg to Miller's rights, by Major Thomas, was made without proper and legal authority.

4. The power of attorney under which Thomas acted, did not authorise alienation and subrogation. *Louisiana Code*, 2965, 6.

5. A power to make a conventional subrogation, must be special and express. *La. Code*, 2156.

6. The power of attorney could not be received in evidence until proved; Maj. Thomas was an incompetent witness to prove it, on the score of interest, having a fee depending upon the event of the suit, and ought not to have been admitted. *La. Code*, 2260. 1 *Dallas*, 62.

PORTER, J., delivered the opinion of the court.

This is an action commenced by the assignee of a mortgage, to enforce it on property in the hands of a third possessor. The petition contains a prayer that the defendant be condemned to deliver up the property, or pay the amount due.

The answer presents a general denial; a plea of payment; an averment that the transfer of the mortgage was made by a person not duly authorised to alienate it: and, lastly, that the plaintiff paid no consideration for the debt, but, on the contrary, that he acquired it through fraud.

The proceedings throughout, took the form of the *juicio ordinario*, and the cause was submitted to a jury, who found a verdict in favour of the plaintiff, on which verdict the court rendered a judgment, similar to that given in a personal action, where the plaintiff establishes the debt sued for. From that judgment the defendant has appealed.

An objection has been taken in this court, that there is not annexed to the petition an oath, that the debt is justly due, and unpaid; and that payment has been in vain demanded thirty days before suit was brought.

In an hypothecary action, the defendant cannot, after the general denial has been pleaded in the court of the first instance, first raise the objection on appeal, that the oath as to the debt is not annexed to the plaintiff's petition; and that payment has been in vain demanded thirty days before the institution of the suit.

This objection should have been presented as an exception in the court of the first instance, and should have been pleaded in *limine litis*. It is foreign to the merits, and was waved by an answer embracing the general denial, a plea of payment, &c.

It is next urged that the evidence of a demand on the original debtor is insufficient, as the return by the sheriff of *nulla bona*, is made on an execution which was illegal and void. The nullity, it is contended, arises from the plaintiff having issued the execution in the name of the judgment creditor, though the judgment had been already conveyed to the petitioner, and in support of this proposition, observations which fell from the court in the case, *Gray vs. Baldwin*, are principally relied on. The remarks then made, do certainly sustain the ground now taken, but they were not necessary to a decision of that case, and upon an attentive consideration of the matter, we are satisfied they are erroneous. The true principle, we take it, is settled in the case of *Cox vs. Baldwin*. The judgment creditor, it cannot be doubted, might expressly confer such a right on his assignee. If the legal subrogation be as extensive as that which is express, and we think it is, then every right which the creditors possessed, passes by the act of payment to him by whom that payment is made. 4 *N. S*, 196, 1 *Louisiana Reports*, 401.

A surety who pays and is subrogated to the right of the creditor against the principal debtor, may legally issue execution in the name of the judgment creditor.

In the assignment of a judgment the legal and the express subrogation are of equal extent, and every right which the creditor possessed passes by the act of payment to him by whom that payment is made.

On the point now under notice, a further consideration was pressed on us. The sheriff returns that the defendant had left the parish, that he could find no property belonging to him, and that the plaintiff could not show any. Reference is made to the 726th and 727th articles of the *Code of Practice*, to show that a demand must be made of the debtor, before a return of *nulla bona*. To this doctrine we accede, if it be possible to make the demand, but if the debtor

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Personal demand on the debtor, previous to bringing the hypothecary action against the third possessor, will not be required where the debtor has absconded. A return by the sheriff of *nulla bona*, is sufficient.

has removed from the baliwick of the officer before the writ comes into his hands, the demand cannot be made by him, and the ulterior rights of the creditor cannot be defeated by the debtor absconding. The code in the articles cited, gives the general rule, and leaves it open by the exceptions which accompany all laws, and which necessarily grow out of circumstances that are inseparable from the affairs of men. *Lex neminem cogit ad vana seu impossibilia.*

On the trial of the cause, the plaintiff offered his counsel as witness, he was objected to on the ground that he was interested in the event of the suit, and was interrogated on his *voir dire*, to establish that interest. He swore "that he had not stipulated any particular fee with his client, but expected to be paid for his legal services; that it was his habit, when he had not stipulated for his fee, to charge less, should he fail in the cause, than if he were to succeed; and that he would feel bound by his rule of conduct, to apply it to this case." We think the judge did not err. We are inclined on all occasions, where the strict rules of law do not controul us, to favour the admission of testimony, and leave the credit to be weighed by those who are required to decide on it. The correct rule, as we understand it, is, that the interest which disqualifies a witness, must be a legal interest. The case cited in argument, is one of many which has been decided in the United States on this subject. It shows that in that instance, an honorary interest excluded the witness. The authorities in our sister states conflict, though they preponderate in favor of the proposition, that an interest which is not legal, will disqualify a witness. To produce that effect in England, the interest must be direct and legal. In the instance before us, though the witness felt the obligation which his habits of business had imposed, to vary his charge for compensation with the event of the suit, there was surely no legal obligation on him to do so. The legal responsibility of the client was to pay him the value of his services, and this value was to be tested by the labour and pains bestowed on the cause, and the degree of responsibility incurred, not by the success which attended his efforts. The

An attorney, interrogated as a witness in a cause upon his *voir dire*, swore "that he had not stipulated any particular fee, but expected to be paid for his legal services, and that it was his habit, when he had not stipulated for his fee, to charge less should he fail in the cause, than if he were to succeed, and that he would feel bound by his rule of conduct to apply it in this case." It was held by the court that he was admissible as a witness for his client.

physician who conquers a disease, is in law entitled to no more remuneration, than when he is baffled by it and sees all his exertions fruitlessly terminate with the loss of his patient's life. *Starkie on Evidence, part* 4, 746, 747, *and notes to* 747. *Phillips on Evidence*, 63.

There is another bill of exceptions taken to the opinion of the judge refusing to admit the original debtor as a witness, on the part of the defendant. The witness had a direct interest in the cause, and a legal interest too, for if the plaintiff succeeded in the action, the witness was responsible in an action of warranty to the defendant, who had purchased the property at a sale, under a writ of execution. *See Code of Practice*, 711.

A debtor who is liable in warranty, if the plaintiff succeeds against his vendee, has a direct legal interest, which renders him incompetent to testify in the cause.

The plaintiff became the assignee of the mortgage under a transfer made by an attorney, who was empowered "to arrange, settle and receive the amounts of a claim due me by G. C. Russell, and which is at this time in the hands of my said attorney, hereby clothing him with full power to do any thing in relation to said claim that he may think proper, or take any steps for the security thereof that he may think advisable."

It is contended, that the power did not authorise the transfer, because a transfer is an alienation, and by our law the authority to sell or to buy, must be special and express. The authority to collect a note, necessarily implies the power to extinguish the right of the creditor in it, and whether the payment be made by the debtor or any other person by which this extinction is produced, is a matter of no importance, provided the attorney, as in the case before us, expressly stipulated that the transfer was made without recourse to, or liability of, his client. The act of the agent, we, indeed, think was in exact compliance with the power which authorised him *to take any steps for the security of the debt.*

The authority to collect a note, necessarily implies the power to extinguish the right of the creditor in it, and whether the payment by which this extinction is produced be made by the debtor or any other person, is a matter of no importance, provided the attorney expressly stipulates that the transfer is made without recourse to his client.

It is not objected that the transfer did not convey the right of mortgage, because by the act which evidences it, the plaintiff is subrogated to all the rights and privileges of the creditor; and rights and privileges, it is said, are different

from and do not include mortgages. In support of this proposition, we are referred to the *Louisiana Code*, 2156, which declares that the subrogation is conventional when the creditor subrogates the person paying him, in his rights, actions, privileges and mortgages. It is further urged that the use of these four words, show clearly that they have all a different meaning, and that the use of the words actions, mortgages and privileges were unnecessary, if rights included them. This argument pays a compliment to law makers, which we are afraid they are not always entitled to. It supposes that they never use words which are unnecessary or superfluous. Our experience teaches us not to adopt such a presumption, and that in legislation, as well as in other matters, there is often an useless employment of many words to express the same idea. The case before us is a strong example of the kind. It is very clear that the word *rights*, embrace the other things enumerated. We must come to that conclusion, unless we adopt the absurd one, that a mortgage or privilege was not a right which belonged to the creditor.

The word "rights," in *Louisiana Code*, art. 2156, embraces every thing included in the following words, "actions, privileges and mortgages."

These opinions render it unnecessary to express any on the third bill of exceptions, taken to the judge's charge to the jury.

We think the judgment of the court below, here should be reversed; it is absolute for the payment of money, when it should, in pursuance of the prayer of the petition, have been in the alternative.

If an absolute judgment be rendered when the petition prays only for a conditional one; it is good ground for reversal.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and it is further ordered, adjudged and decreed, that unless the defendant shall within ten days after the notification of this judgment, pay to the plaintiff the sum of five hundred and seventy-six dollars and sixty-four cents, with interest, at eight per centum per annum, from the 1st of January, 1830, on five hundred and twelve dollars and twenty-seven cents, and costs in the court below, that then a writ shall issue for the seizure and sale of the negroes

mentioned in the petition, to satisfy the sum now decreed to be due to the plaintiff; and, it is further ordered, that the costs of appeal shall be borne by the appellee.

FLINT, SYNDIC, &c. *vs.* CUNY ET AL.

APPEAL FROM THE COURT OF THE SIXTH DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

No amendment by the judge *a quo*, of a judgment, can be made after the judgment has been signed, nor before, except for the causes enumerated in the 547th article of the *Code of Practice*.

When the judge *a quo* amends a final judgment, after signing it, and appeal be taken from that amended judgment, the Supreme Court is not authorised to examine the first judgment.

In such a case, the effect of the first judgment is suspended, and does not resume its legal character till after the reversal of the second judgment.

The petitioner, as syndic of the insolvent succession of Samuel C. Cuny, deceased, sues to set aside two conveyances by authentic act, of sundry slaves and other property, by Samuel C. Cuny, in March, 1826, to Stephen E. Cuny, and by the latter in May following, to R. R. Cuny, each conveyance expressing as the consideration, the sum of eight thousand dollars.

The plaintiff representing the creditors of the succession of S. C. Cuny, alleges that these sales were simulated and without consideration, both as regards the parties to them and the creditors of the insolvent succession. He prays that said conveyances be declared null and void, and that R. R. Cuny, the last vendee, be condemned to deliver up the property for the use of the creditors he represents, &c.

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S. E. Cuny answers and denies the allegations of the petitioner, and says the conveyance to him, and from him to R. R. Cuny, were made for a valuable consideration, and for just and legal purposes, &c.

R. R. Cuny says the conveyance to him, was to take an agreement off his brother's hands to pay a debt owing by Samuel C. Cuny, to N. Cox, in New-Orleans, and that he had paid, and obligated himself to pay the same, amounting to upwards of one thousand nine hundred dollars. That he had acted in good faith and without prejudice to the creditors of S. C. Cuny.

Both defendants avered, that more than one year had elapsed from the date of the sales, to the institution of this suit. They pleaded the prescription of one year; and avered also, that the persons complaining were not creditors at the time of the sale to S. E. Cuny.

In answer to interrogatories, both defendants admitted that no money was paid at either sale, but that the property was conveyed for the purpose of paying a judgment debt, due by S. C. Cuny, to N. Cox.

The jury found a verdict cancelling the two sales, and restoring the property, after reimbursing R. R. Cuny one thousand nine hundred and fifty-eight dollars, paid by him to N. Cox, and certain costs. Judgment was rendered on this verdict, and signed November 11th, 1831.

On the next day a motion for a new trial was made and overruled.

On the 18th of November, the court opened the judgment with a view to correct it, and make it more in conformity with the verdict of the jury. The judgment as corrected was signed seven days after signing the first one.

The defendants excepted to this judgment, and to the opinion and act of the court so amending its original judgment.

MARTIN, J., delivered the opinion of the court.

The defendants are appellants from a judgment which they contend was irregularly rendered, after a former judg-

ment had been signed three days after the verdict had been given, and no motion made for a new trial. The District Court expressing its opinion, that it could correct its own judgment during the term, even *ex officio*, and accordingly rendering a second judgment in greater conformity to the verdict than the first.

No amendment by the judge a *quo*, of a judgment, can be made after the judgment has been signed, nor before, except for the causes enumerated in the 547th article of the *Code of Practice*.

We are of opinion the judge erred. The *Code of Practice*, 547, allows the court to make certain amendments, which it enumerates, until the judgment has been signed. This is certainly an affirmative, pregnant with the negative, that no amendment can take place after the judgment has been signed, nor before, except in one of the enumerated cases; but we have a positive provision on this subject. A judgment, when duly rendered, (in the French text *signé*) becomes the property of him, in whose favor it has been given, and the judge cannot alter the same, except in the mode provided for by law. *ibid.* 548.

Being of opinion that the district judge erred, in rendering the second judgment, the next inquiry is, as to the course we are to pursue after its revisal. It was given on a motion for a new trial, and as we are to give the judgment, which in our opinion ought to have been given below, in lieu of the one we reversed, and we think this ought to have been, that the motion for a new trial be overruled.

We have next considered, whether we could examine the first judgment, and it has appeared to us, that we could not, as neither party has enabled us to do so, by an appeal, and it is a final and not an interlocutory judgment, duly signed; and which consequently has not, because it could not be altered by the court who rendered, except in the mode prescribed by law, as in an action of nullity. The idea has presented itself to our minds, that the appellees, if they be dissatisfied with the first judgment, may be said to be precluded from the right of having it examined here, if they do not exercise it now; but after the most mature consideration, it has appeared to us, this is not the case, for as the proceedings below, since it was signed, prevented its execution till they were acted upon in this court, and as there cannot

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In such a case, the effect of the first judgment is suspended, and does not resume its legal character till after the reversal of the second judgment.

be two final judgments in the same cause, and in the same court, the effect of the first judgment was suspended, and it did not resume its legal character, till after the reversal of the second judgment. *Contra non valentem agere non currit præscriptio.*

It is, therefore, ordered, adjudged and decreed, that the judgment rendered by the District Court, after the motion for a new trial be annulled, avoided and reversed, the motion for a new trial overruled. The costs of the appeal to be borne by the appellee.

MILLER *vs.* WHITTIER ET AL.

APPEAL FROM THE COURT OF THE SIXTH DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

In an assignment of errors apparent on the face of the record, nothing can avail the appellant which could have been cured by evidence legally introduced in the inferior court.

If the correctness of a judgment be questioned and the Supreme Court are not furnished with the evidence on which it was rendered, it will be presumed to have been rendered on evidence which authorised it.

A judgment of the inferior court cannot be altered against a party who is not before the Supreme Court.

While the appellant is by the judgment condemned to pay the exact sum he owes, he cannot assign as error that the plaintiff has also judgment against another person for an equal or less sum.

This suit is brought against the drawers and endorser of the following note.

"$400 Alexandria, April 2, 1832.

"On the first day of March, 1833, we jointly and

severally promise to pay to the order of John Taylor, four hundred dollars with ten per cent. per annum interest thereon, from the *first* of March last, until paid, for value received, payable and negotiable at the Bank of Louisiana, at Alexandria."

"Jeffries and Whittier."

Endorsed "John Taylor."

The petition charges R. S. Jeffries and Osgood Whittier as drawers, and John Taylor as endorser, to be liable *in solido* for the amount of the note; and prays judgment against Whittier and Taylor *in solido*, Jeffries being dead.

In making protest of the note, the notary states that at the request of *the bank*, he presented the note to the cashier thereof for payment, who "replied that he would not pay said note," wherefore, he the said notary protests, &c.

The note was deposited in bank for collection without the endorsee's putting his name on it. He now sues in his own name and right.

The district judge in rendering judgment on the minutes, decided that the defendants were bound *in solido* and gave judgment against all of them accordingly.

Upon a motion for a new trial, without granting or deciding on it, the judge proceeded to *revise* his judgment, and condemned Whittier to pay $200 as drawer, and Taylor the endorser to pay the whole amount of $400 with interest; the costs to be borne equally by both parties. No evidence appears in the record, upon which the amendment of the judgment was made.

Taylor appealed.

MARTIN, J., delivered the opinion of the court.

The defendant and appellant relies for the reversal of this judgment on an assignment of errors on the face of the record.

1. From the allegation in the petitions the note and protest do not correspond. The endorsement showing the Bank of Louisiana was the holder and not the plaintiff; and if the

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latter put the note in bank for collection, the proceeds would have gone to the credit of the appellant, Taylor, the only endorser, so that the note could not be protested.

2. The note is not in law or commerce a negotiable note, and Taylor as assignee, guaranteed nothing but the existence of the debt.

3. If the note was negotiable, all persons who placed their names on it, were bound *in solido*, and so the first and amended judgment was correct.

4. The District Court erred in amending the judgment on the motion for a new trial.

5. On the final judgment against Whittier, he is responsible to his co-defendants for one half of the amount of the note, while if it is to be considered as negociable, he would as drawer be liable to the drawee for the whole.

6. By the final judgment the appellee can issue execution against Whittier for one half of the debt, and against the appellant for the whole, whereby he has judgment for the amount of his claim and one half more.

According to the settled jurisdiction of this court, nothing can avail the appellants in an assignment of error apparent on the face of the record; that could have been cured by evidence legally introduced in the inferior court.

In an assignment of errors apparent on the face of the record, nothing can avail the appellant which could have been cured by evidence legally introduced in the inferior court.

I. According to this view of the case, the plaintiff might well have proved at the trial, that he had deposited the note for collection; that the practice in the office of the institution at Alexandria is different than is alleged, or was departed from in this instance.

II. It may have been shown that all the parties to the note are merchants and the note was given in a mercantile transaction.

III. The third assignment of error assumes the correctness of the first judgment. As we have not before us the evidence on which it was given, our duty is to presume it was rendered on evidence which authorised it.

If the correctness of a judgment be questioned, and the Supreme Court are not furnished with the evidence on which it was rendered, it will be presumed to have been rendered on evidence which authorised it.

IV. Whittier is not appellant of the second payment, and it does not affect the interest of Taylor the only appellant, who does not complain of it otherwise than affecting his own

interest, and not as affecting those of Whittier and thus perhaps individually his own, as having an interest in having a different judgment against Whittier, which cannot be done whilst the latter is not before us.

A judgment of the inferior court cannot be altered against a party who is not before the Supreme Court.

V. Assignment of error relates to the amount of Whittier's liability, which for the reasons just given cannot be the object of our consideration in the present case.

While the appellant is by the judgment condemned to pay the exact sum he owes, he cannot assign as error that the plaintiff has also judgment against another person for an equal or less sum.

VI. While the appellant is by the judgment condemned to pay the exact sum he owes, he cannot assign as error that the plaintiff has also judgment against another person for an equal or less sum.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Barry, for the plaintiff and appellee.

HAMBLIN *vs.* HOOK, ADMINISTRATRIX.

The father-in-law is a competent witness to testify in behalf of his son-in-law.

The 984th article of the *Code of Practice*, which requires all unliquidated claims against an estate to be first presented to the administrator before suit is brought, does not require proof or evidence to be produced to him.

The plaintiff sues on an account for $707 18, alleged to be due by the late C. F. Morehouse, whose estate is administered by the defendant. She denies that she refused to allow the account, and avers that she noted the items in the one presented to her, which she was willing to allow, those that required proof and those that were absolutely inadmissible. She avers that the account sued on, although containing the same items, is not the one she noted. She offered proof of the items she approved, and others which

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she marked when the account was first presented and prayed to be allowed her costs.

On hearing all the evidence the Probate Judge rejected several items in the account, allowed the remainder and decreed that the plaintiff should pay costs for having instituted his action prematurely.

On the trial the plaintiff introduced Robert Williams, his *father-in-law*, as a witness to prove his account. The witness was objected to, as being disqualified on the ground of *affinity* under the 2260th article of the *Civil Code*. The court overruled the the objection, and a bill of exceptions was taken.

MARTIN, J., delivered the opinion of the court.

The defendant, sued on an unliquidated claim against the estate, pleaded the general issue, and that the amount sued on was presented to her according to law; but that another was presented to her, on which she admitted such of the items, as appeared to her correct and declared her willingness to allow the others if they were proven.

The plaintiff had judgment for part of his claim, but was decreed to pay costs. He appealed.

Our attention has been first drawn to a bill of exceptions taken by the defendant to the admission of the plaintiff's father-in-law, as a witness for him. There was a difference of sentiments on this question between one of the members of this court and the others, but we are all satisfied that the law on this head may be considered as settled by the case of *Bernard et al.* vs. *Viguaud*. 10 *Martin*, 554.

The father-in-law is a competent witness to testify in behalf of his son-in-law.

On the merits we think the Court of Probates correctly rejected the items in the account, which it rejected.

But we think it erred in sustaining the defendant's pretentions on the score of costs. The *Code of Practice*, 984, requires indeed the presentation of an unliquidated claim to the administrator of an estate before suit be brought thereon, but we are ignorant of any law requiring proof or evidence to be produced to him. This, in many cases, would,

PARGOUD vs. GUICE, ADM'R, ETC.

The 984th article of the *Code of Practice*, which requires all unliquidated claims against an estate to be first presented to the administrator before suit is brought, does not require proof or evidence to be produced to him.

be impossible; in others difficult. The witnesses may reside at a distance, and even out of the state; or if more, may refuse to come. If the administrator be not satisfied with the correctness of the claim, nothing prevents his objecting thereto or refusing his approval. If he does, the party may bring suit. 1 *Martin*, 986.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be annulled, avoided and reversed, and proceeding to give such a judgment as in our opininion ought to have been given below; it is ordered, adjudged and decreed, that the plaintiff recover from the defendants one hundred and forty-five dollars and forty-three cents, with interest at the rate of five per cent. per annum on sixty-five dollars and eighteen cents, from the 18th January, 1833, and on eighty dollars and twenty-five cents, from the date of this judgment, the whole to be paid in the due course of the administration of the estate, with costs in both courts.

PARGOUD *vs.* GUICE, ADMINISTRATOR, &c.

APPEAL FROM THE COURT FOR PROBATES FOR THE PARISH OF OUACHITA.

A witness for plaintiff has no right to refresh his memory by reference to the plaintiff's books, where it does not appear the entries were made by the witness.

A general allegation of a party being indebted in a gross sum, without any specification of the time, place or manner, in which the claim accrued, is too vague, to authorise the admission of proof in support of it.

The plaintiff sues Guice as the administrator of the estate of Jeremiah Griffin, deceased, who died in January, 1832,

claiming from said estate, the sum of one thousand fifty-four dollars and twenty-nine cents, with interest. The demand is made up of several notes and accounts alleged to be due and owing by the succession of Griffin, at the time it was opened. He prays judgment, and that his demand may be paid out of the succession of Griffin, by the defendant, as administrator.

The defendant denies that the estate owes the plaintiff any sum, but avers that the latter is indebted to the estate which he administers, in the sum of four thousand six hundred sixty-nine dollars and fifty-five cents. He avers that he has always been ready to settle accounts with the plaintiff; has never refused to allow claims properly presented; and that the demand sued on, never was legally presented.

The judge of probates gave judgment allowing the whole amount claimed, and ordered property enough of the estate of Griffin, to be sold for cash, to satisfy the judgment.

The defendant moved for a new trial, on the following grounds:

1. That the judgment was contrary to law and evidence.

2. That the decree to sell the property for cash, was contrary to the determination of a family meeting, which had ordered it to be sold on a credit, &c.

The motion being overruled, the defendant appealed.

R. C. Scott, attorney of plaintiff, proved the presentation of the demands sued on, to the administrator for payment, and his refusal to allow them.

A bill of exceptions was taken by defendant, to the opinion of the judge, allowing a witness for plaintiff to refer to his books to refresh his memory, in relation to the accounts about which he was testifying.

Another exception was taken by the defendant to the judge's decision, overruling his motion to introduce evidence, showing that the estate did not owe the amount claimed, and that a deduction should have been made, before the administrator could allow any portion of plaintiff's claim, and before the latter could sue, &c. The evidence was rejected on the ground of not being set up in the pleadings;

payment not being pleaded; but, that the plaintiff owed the defendant a larger sum.

MARTIN, J., delivered the opinion of the court.

The defendant resisted the claim against the estate on the ground that the plaintiff was not a creditor of one thousand fifty-four dollars and twenty-nine cents, as he stated, but was a debtor of the deceased for four thousand six hundred sixty-nine dollars and fifty-five cents; and on these grounds the plaintiff had judgment, and the defendant appealed.

His counsel took two bills of exceptions in the court below; the one was to the court allowing the plaintiff's books to be introduced for reference, by his clerk, who was offered as a witness to establish the items in plaintiff's account; and the other was to the refusal by the court to receive in evidence certain documents, by which the defend ants wished to prove that the plaintiff owed to the estate.

We think the court erred in permitting the use of the plaintiff's books, and permitting the witness to resort to them to refresh his memory. There is not a clearer rule of evidence, than that which declares the plaintiff's books not to be evidence for him; and that a paper which could not be read in evidence, may be resorted to by a witness to refresh his memory, as a memorandum made by himself. It is not pretended that the entries in the plaintiff's books, to which the witness was permitted to recur, had been made by himself. They might have been made by another clerk, or the plaintiff himself, or by his order and direction.

A witness for plaintiff has no right to refresh his memory by reference to the plaintiff's books, where it does not appear that the entries were made by the witness.

But we think the Court of Probates consistently rejected the documents by which the defendant sought to prove claims on the estate of the plaintiff. These claims were not pleaded in compensation or re-convention, nor set up in such a manner as to enable the plaintiff to be informed of their nature or amount. So to be able to disprove or admit them. A general allegation of the plaintiff's being indebted in a gross sum without any certificate of the trial, plan

A general allegation of a party bing indebted in a gross sum without any specification of the time, place or manner in which the claim accrued is too vague to authorise the admission of proof in support of it.

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or manner in which the claim accrued, is too vague to authorise the admission of proof in support of it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be annulled, avoided and the case remanded, with directions to the judge not to allow the plaintiff's witness to refresh his memory by a reference to the plaintiff's books; the costs of appeals to be borne by the appellee.

ROW *vs.* RICHARDSON ET AL.

APPEAL FROM THE COURT OF THE SEVENTH DISTRICT, THE JUDGE OF THE DISTRICT PRESIDING.

In an action on an obligation to deliver a certain quantity of cotton, where the plaintiff in an amended petition, alleged a promise made after the obligation had fallen due, to pay the amount in money; held proof of putting the defendant *in morâ* is unnecessary, and that plaintiff was entitled to recover on proof of the subsequent promise as alleged.

The plaintiff sues William Richardson, Levi Guice, and John M'Cormick, on a joint and several obligation to pay three hundred dollars in all the month of January next ensuing the date, payable in merchantable cotton at the market price, to be delivered in the town of Monroe. He alleges an amicable demand of the obligors, and refusal to comply with their obligation; wherefore he prays judgment for the sum of three hundred dollars with interest and costs.

The defendants pleaded a general denial. On the trial Richardson and M'Cormick separated. There was a verdict and judgment against the first for the amount of the obligations and in favor of M'Cormick.

The plaintiff moved for a new trial, which was overruled. Richardson appealed.

The obligation was made by Richardson as principal, and signed by Guice and M'Cormick as sureties, and staked on a horse race and won by the plaintiff.

The evidence showed that it was agreed among the parties, that another person was to have signed as surety, but who declined after Guice and M'Cormick signed.

There was no evidence that the cotton was ever demanded, but it was in proof that M'Cormick, when pressed for payment, observed that he knew he was bound for the whole of the note, and expressed his willingness to pay his portion of it. On the trial the defendants introduced Guice, who had been released by a former verdict, to prove the want of consideration, and that the note was incomplete for want of all the signatures that were agreed on. The plaintiff excepted to the opinion of the court admitting this witness.

MARTIN, J., delivered the opinion of the court.

This case was before us in the appeal of the plaintiff last year, who complained that judgment had not been given against Richardson, Sureties, & Co. defendants. Richardson now seeks the reversal of the judgment against him.

The suit was brought on an obligation to deliver a quantity of cotton, but the plaintiff in an amended petition alledged, that Richardson, after the cotton had become due, had promised to pay the debt in money. On the plea of the general issue the plaintiff had a verdict and judgment.

In an action on an obligation to deliver a certain quantity of cotton where the plaintiff in an amended petition alleges a promise made after the obligation had fallen due to pay the amount in money; held proof of putting the defendant in *mora*, is unnecessary, and that plaintiff was entitled to recover on proof of the subsequent promise as alleged.

In this court the defendant's counsel has contended that the plaintiff must fail here, because he failed to put the defendant *en demeure* by a legal demand; but the amended petition charges a promise to pay money, and this promise is proven, as well as the execution of the obligation.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be affirmed with costs.

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October, 1833.

HARRISON
vs.
FAULK.

HARRISON *vs.* FAULK.

APPEAL FROM THE COURT OF THE SEVENTH DISTRICT, THE JUDGE OF THE COURT PRESIDING.

A cause will be remanded, if on the trial in the inferior court, the evidence adduced was so confused that the Supreme Court cannot reconcile it with the verdict.

If advantage of the want of an allegation in the plaintiff's petition of putting the defendant in delay be not taken by way of exception, proof of the putting in delay is admissible on the trial, and it is too late for the defendant to oppose its introduction.

The wife, although separated in bed and board from her husband, cannot, without his consent, give a power of attorney to alienate her real estate; though, without his consent, she may give such power in regard to her personal property.

The facts of this case are fully stated in the opinion of the court, delivered by PORTER, J.

This is an action brought to recover from the defendant the price of a plantation and slave, sold to him so far back as the year 1826, and payable in annual instalments. The plaintiffs base their action on the contract of sale, and allege that the notes which were given at the time of the conveyance, have come into the hands of the defendant through fraud and collusion with one James Fort Meese, who had a license to practice law.

The answer contains a plea of payment, and an averment that the defendants have been evicted of the land purchased.

An amended petition was filed, in which the plaintiff allege that the notes were in the parish judge's office of Ouachita, where they had been placed by Meese, in consequence of an agreement entered into by him, by which he received the original contract without their consent and approbation.

The cause was submitted to a jury, who found a verdict for the defendant. The plaintiffs appealed.

MATHEWS, J., delivered the opinion of the court.

We have examined, attentively, the facts as they appear on record, and waving for a moment all question as to the authority of the agent, which was so much contested below, we have been unable to reconcile the verdict with the evidence. It has produced the conclusion on our minds, that the whole debt was not paid. It is true, the proof adduced is most confused and perplexed, and it is the diffidence produced on our minds by this circumstance, which has alone prevented us from acting definitely on this case. We think it must be remanded, and in doing so, we cannot help suggesting to the parties, that the ends of justice would be much promoted, by sending the cause before auditors or referees to adjust the accounts.

A cause will be remanded, if on the trial in the inferior court, the evidence adduced was so confused that the Supreme Court cannot reconcile it with the verdict.

It may facilitate the next trial of the cause, if we express an opinion on some of the points of law which were contested below.

An objection was made that no testimony could be received, that the defendants were put in *morâ*, becaue the facts had not been alleged in the petition. We think the court did not err in admitting the proof; the p tting the party in delay, i necessary at all, on obligations such as there sued on, was a condition precedent, and the defect of not averring the demand, should have been taken advantage of by way of exception.

If advantage of the want of an allegation in the plaintiff's petition of putting the defendant in delay, be not taken by way of exception; proof of the putting in delay is admissible on the trial, and it is too late for the defendant to oppose its introduction.

We think the pleadings authorised the introduction of the notes first given. It is true the original petition declared on the act of sa'e, and alleged the notes had come into the hands of the defendant, but the amended one, set out the fact of their being in the parish judge's office, the manner they came there, and prayed they might be brought into court, and concluded by praying judgment.

The powers of attorney were correctly admitted. But in so deciding, it is necessary to state that we are of opinion the wife could not give a power of attorney without the consent of her husband, to alienate her real estate, and that, although separated from him in bed and board. She had the power

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INGHAM ET ALS. vs. THOMAS.

The wife, although separated in bed and board from her husband, cannot, without his consent, give a power of attorney to alienate her real estate, though, without his consent, she may give such power in regard to her personal property.

to alienate her moveable property and administer it, and to that effect the authority given by her could go so far and no further; whether she had the power to acquire real estate, by rescinding the contract she had already entered into in relation to her land and slaves, need not now be examined. If she had the capacity to acquire, it is clear she could not subsequently alienate the property without the marital authority.

The deposition of Meese was admissible to show the assent of the husband or wife to his acts of administration, but not to the alienation of real estate; under the same principle, his receipts for money were good evidence.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the case be remanded for a new trial, the appellee paying the cost of this appeal.

INGHAM ET ALS. *vs.* THOMAS.

APPEAL FROM THE COURT OF THE SIXTH DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

Where a judgment is taken by default and afterwards confirmed, the right of mortgage grows out of the final judgment, and does not revert to the date of the judgment by default.

Every conveyance of property is null and void, which the creditor takes from his debtor, knowing him to be in insolvent circumstances, and by which the debt is secured and an advantage gained over other creditors.

A conveyance of property is null when made to a third person by the insolvent's vendor, in consequence of a payment theretofore made by the insolvent to the vendor. The syndic alone is entitled to recover the property which the insolvent has conveyed in fraud of the rights of his creditors

The facts of this case are stated in the opinion of the court, delivered by PORTER, J.

This action is brought jointly by some of the creditors of an insolvent, and his syndic, to set aside conveyances of slaves which their debtor made to the defendant. All the plaintiffs allege that the agreement gave to the defendant an illegal preference, and the creditors on their own behalf assert that they have a judicial mortgage on the property now sued for, and they demand that it may be made subject to their lien.

The answer put at issue all the material allegations in the petition. There was judgment for the plaintiff, and the defendant appealed.

Where a judgment is taken by default and afterwards confirmed, the right of mortgage grows out of the final judgment, and does not revert to the date of the judgment by default.

The first question relates to the right of mortgage claimed by the creditors. They aver it grew out of a judgment by default, which was previous to the sale to defendant, and that the final judgment related back to the day, that by default was given. We are of a different opinion, but it is unnecessary to enter into the question particularly, for there is no evidence before us that the final judgment was recorded in the office of mortgages previous to the sale to defendant.

On the other point, which relates to the illegal preference given by the insolvent to the defendant, we think the plaintiffs must succeed. It appears from the evidence, that the vendor was in insolvent circumstances at the time of the sale, that the fact was known to the buyer, and that the consideration of the sale was debts due to him. It is true the case is one which presents on the part of the defendant, and as between him and the insolvent, a case of the strongest equity, one in which the indulgence of generous and disinterested feelings has occasioned him to sustain losses to a very large amount. But the law for purposes, which it does not behove us to inquire, has not permitted such considerations to form exceptions to the general rule. It imperatively annuls all agreements, where the creditor know that the debtor is in insolvent circumstances, and takes from him a conveyance, by which a previous debt is secured, and an advantage gained over the creditors. *La. Code*, 1977, 1978, 1979.

Every conveyance of property is null and void which the creditor takes from his debtor, knowing him to be in insolvent circumstances, and by which the debt is secured and advantage gained over other creditors.

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A conveyance of property is null when made to a third person by the insolvent's vendor, in consequence of a payment theretofore made by the insolvent to the vendor. The syndic alone is entitled to recover the property which the insolvent has conveyed in fraud of the rights of his creditor.

We do not think that the circumstance of the negro Quamly having been conveyed by the insolvent's vendor to the defendant, can authorise a different judgment from that we are called on to give in relation to the other slaves, for that conveyance appears to have been made in consequence of a payment theretofore made by the insolvent to the vendor.

The judgment of the District Court is erroneous in directing that the property be applied to satisfy the judgment of the creditors who sue in this case. It must be surrendered to the syndic of the estate of the insolvent, whether on a distribution of the effects of the estate, the creditors of the firm or those of the individual member who is declared insolvent, shall take the proceeds in a matter not now before us.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and it is further ordered, adjudged and decreed, that the plaintiff Mason, syndic of the estate of J. C. Ryon, do recover of the defendant the slaves mentioned in the petition with costs in the court below, those of appeal to be borne by the appellees.

TEXADA vs. BEAMAN.

APPEAL FROM THE COURT OF THE SIXTH DISTRICT, THE JUDGE OF THE DISTRICT PRESIDING.

A power of attorney to collect a debt, and to do all acts necessary to effect the collection, does not authorise the agent or attorney to transfer the claim of his principal, in order to protect the transferee from the consequences of a suretyship.

The plaintiff states that a certain judgment was obtained by P. and R. Peebles, against one Martha Welch, and that

execution issued and was levied on a tract of land, formerly belonging to H. P. Welch, but which was sold and conveyed to him (plaintiff) during the pendency of these proceedings. He alleges also, that the above judgment has been transferred and set over to him by E. F. Briggs, the attorney in fact of P. and R. Peebles, wherefore, he prays for an injunction to stay the proceedings.

The conveyance or transfer of this judgment was made with a view to protect Texada, from a security debt of Peebles and wife, who were about removing to Texas.

The injunction was granted. The defendant denied the authority of the attorney in fact, to transfer the judgment, and prayed a dissolution of the injunction.

The power of attorney given by Peebles and wife, to Briggs, authorising him "to ask for and receive, and if necessary to sue for any sum or sums of money that might be due, &c.," "to execute and deliver receipts and acquitances for any claim, &c., and in short to do all acts in relation to any business in which I may be concerned for the recovery of debts or receipts of money, &c., hereby ratifying whatever the attorney may lawfully do in the premises, &c."

The district judge was of opinion this power was insufficient to transfer the judgment from the principals to Texada, and gave judgment for the defendants.

The plaintiff appealed.

Porter, J., delivered the opinion of the court.

This case turns entirely on the authority of an agent to transfer a debt. He was empowered to collect it, and do all acts necessary to effect the collection. Under this power he passed the claim to a surety of his principal, in order to protect the transferee from the consequence of his engagement. We are of opinion he had no authority to do so, and it is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

A power of attorney to collect a debt, and to do all acts necessary to effect the collection, does not authorise the agent or attorney to transfer the claim of his principal, in order to protect the transferee from the consequences of a suretyship.

Thomas, for plaintiff and appellee.

Dunbar, contra.

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HAGLER *vs.* PARGOUD ET AL.

APPEAL FROM THE COURT OF THE SEVENTH DISTRICT, THE JUDGE OF THE DISTRICT PRESIDING.

The Supreme Court can entertain jurisdiction of a cause only where the matter in dispute exceeds three hundred dollars.

The plaintiff sues on an attachment bond, executed by the defendant in a former suit against the present plaintiff. He claims two hundred dollars as the penalty, on the ground that the attachment had been wrongfully sued out; and twenty-five dollars paid his counsel; twenty-five dollars travelling expenses; and fifty dollars for his trouble, &c. in attending the suit.

The defendant admitted the execution of the bond, and that the attachment was set aside, but not on the ground that there was no cause for it. He pleaded a general denial, and that the plaintiff had sustained no injury.

The district judge on hearing the testimony gave judgment in favor of the plaintiff for thirty dollars.

The defendant appealed.

Winn, for defendant and appellant.

1. The present defendant obtained judgment in the attachment suit against the present plaintiff, for his *debt*, but the attachment was dismissed by reason of the insufficiency of the oath or affidavit.

2. The appellant now contends that a judgment of dismissal or non-suit is not sufficient on which to base the plea in bar of *res judicata*.

3. That although the attachment may have been dissolved, the present defendant may show in this action that he had good reasons to apply for an attachment, and if he does he cannot be mulcted in damages. 6 *Mar. N. S.* 238. 8 *Ibid* 484.

4. No damages are shown to have resulted from the attachment.

MARTIN, J., delivered the opinion of the court.

This is a suit on an attachment bond, and the plaintiff claims the amount of the penalty, which is two hundred dollars; twenty-five dollars for a lawyer's fee; twenty-five dollars for travelling expenses, and fifty dollars for loss of time and detention. These aggregated sums form that of three hundred dollars. The judgment appealed from is for thirty. The constitution has confined our jurisdiction to cases where the object in dispute exceeds in value the sum of three hundred dollars.

The supreme court can entertain jurisdiction of a cause only where the matter in dispute exceeds three hundred dollars.

It is therefore ordered, adjudged, and decreed, that the appeal be dismissed at the appellant's cost.

KELSO *vs.* BEAMAN.

APPEAL FROM THE COURT OF THE SIXTH DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

A debt as between debtor and creditor is indivisible without the consent of both.

The legal transferee has no greater interest than the voluntary one. The 651st article of the *Code of Practice*, does not change the rights, which under law third persons had to resist partial tranfers of their debt.

The plaintiff alleges the defendant took a mortgage from G. C. Russell, on a tract of land and several slaves, to secure a nominal sum of $7890, when in fact, and which was shortly afterwards ascertained, Russell only owed him about the sum of $3542. In October, 1829, all the interest of Russell

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in the mortgaged property was sold at sheriff's sale, and purchased by the defendant, subject to his mortgage claim of $7890, who gave his twelve months bond for the surplus of $2000.

The plaintiff alleges that there remained in the hands of the defendant over and above what Russull actually owed him, a sum equal to three or four thousand dollars. Having an execution against Russell for twelve hundred dollars, he had it levied on the same alleged to be in Beaman's hands, and sold at public sale, all of which Beaman had notice.

Kelso becoming the purchaser under his own execution he now sues the defendant and prays judgment for twelve hundred dollars, with interest and costs.

The defendant pleaded a general denial and had judgment. The plaintiff appealed.

The plaintiff produced in evidence an agreement and settlement between Russell and Beaman, made the 17th of January, 1829, in which it is acknowledged the balance due the latter is $3542 82, after deducting all the claims he had paid for the former. The sheriff's deed dated October 23, 1829, in which Beaman purchased all Russel's residuary interest in the mortgaged land and slaves, was also in evidence.

Dunbar, for the plaintiff and appellant.

1. Contended that the defendant by his purchase at sheriffs sale of the property of Russell, subject to his mortgage which had been given for an amount larger by several thousand dollars, than was actually due to him. The defendant became indebted to Russell for the difference between the sum of money actually due, and the nominal amount of the mortgage, and that the plaintiff properly levied his execution thereupon.

2. That the agreement under private signature between Russell and Beaman, could not be binding on third persons; the same not having been recorded, and being without date in law. Further, that the renunciation of Russell in said agreement must be held gratuitous, and from the agreement

itself, it manifestly appeared that their had been collusion between Beaman and Russell, to cover the property from other creditors.

Thomas, for the defendant and appellee.

1. The property conveyed to Beaman was to cover actual advances, and others every day occuring. But Russell had, in 1828, discharged Beaman from all responsibility on receiving the surplus of the sales of his property in Beaman's hands.

2. If Russell had a right to receive the surplus, he had an equal right to release and discharge Beaman when he paid it over.

3. And if the release from Russel to Beaman is valid as between themselves, which cannot be doubted, creditors cannot complain unless they allege and show fraud to their prejudice.

PORTER, J., delivered the opinion of the court.

On the 21st August, 1828, one Gilbert C. Russell, mortgaged to the defendant a plantation and slaves. The deed expresses that lien was furnished to secure him for advances he had made on behalf of the mortgager, to the amount of seven thousand eight hundred and ninety dollars.

The 30th October, 1829, several judgment creditors of Russell, seized the slaves which had been mortgaged to the defendant, and proceeded to sell them. At the sale the defendant became the purchaser, for the sum of two thousand dollars above the amount for which they had been previously hypothecated to him.

The succeeding year, the plaintiff, who was also a judgment creditor of Russell, seized and sold all the interest either actual or residuary which Russell had in or to twelve hundred dollars of that sum of seven thousand eight hundred and ninety dollars, which by the act of mortgage, he had declared was due to the defendant Beaman.

This seizure could only have been made on the suspicion that the whole of seven thousand eight hundred and ninety dollars, which Russell acknowledged he had been paid by Beaman, was not so in fact.

This suspicion appears to be well founded, for by the evidence now before us, it appears that the defendant acknowledged by an instrument of writing, that only three thousand five hundred and forty-two dollars and eighty-two cents was due to him, and that he was ready to reconvey the slaves to Russell, as soon as there was paid to him this sum, together with that of two thousand dollars, which he had advanced at the sheriff sale, and other sums for which he had become responsible.

The petition states that the defendant in consequence of the purchase of Russell's residuary interest by the plaintiff is indebted to him in the sum of twelve hundred dollars.

The view we have taken of the case, renders it unnecessary to decide what was the effect of the lien on the debt in the defendant's hands.

The return of the sheriff and his act of sale to the plaintiff state that he secured whatever interest either actual or residuary which G. C. Russell had in twelve hundred dollars of the sum of seven thousand eight hundred and ninety dollars, acknowledged to be due to Beaman by the act of mortgage.

A debt as between debtor and creditor is indivisible, without the consent of both.

It was decided in the case of *King et al.* vs. *Havard*, in this court on principles which are incontestible, and on the highest authority, that a debt as between creditor and debtor, was indivisible without the consent of both. *See* 5 *N. S.* 194.

The legal transferee has no greater interest than the voluntary one. The 651st article of the *Code of Practice*, does not change the rights which under law third persons had to resist partial transfers of their debts

The legal transfer in in our opinion can have no greater interest than the voluntary one. The 651st article of the *Code of Practice*, with all the rest of the section to which it belongs, treats of the rights of the plaintiff and defendant in execution, and cannot on any sound principles be held to change the rights which under law third persons had to resist partial transfers of their debt. The sheriff must sell the entire debt; he could not sell half the defendant's interest in a slave, though the whole might amount to more than the execution in his hands.

The judgment of the court below is unclerical and somewhat abmiguous, we understand it to be one of non-suit, and as such it is ordered, adjudged and decreed, that it be affirmed with costs.

STAFFORD *vs.* SMITH.

APPEAL FROM THE COURT OF THE SIXTH DISTRICT, THE JUDGE THEREOF PRESIDING.

The prescription of one year applies to an action instituted to correct a former judgment, which it is alleged is erroneous, and some of the items composing it fraudently charged; and if such an action be brought more than a year after the judgment, proof must be given that the fraud has been discovered within a year.

Although a party is precluded from attacking a judgment on the ground of fraud or nullity, after the lapse of one year, yet where the petition sets up payments and matters arising since the judgment complained of, they will be inquired into.

A receipt of a payment given since the institution of suit, not claimed in an amended petition, will not, if objected to, be admitted in evidence, to prove the allegation of payment made in the petition, praying to enjoin further proceedings as an execution on other grounds.

Where interest and commissions for advancing cash are charged in a balance account attacked as erroneous, proof of an agreement must be adduced, or the charges will be rejected.

This suit commenced by injunction. The petition was filed on the 8th of February, 1831. The plaintiff alleges, that in April, 1829, he confessed a judgment in favor of Palmer Smith, for two thousand five hundred forty-five dollars and eight cents, with ten per cent. per annum, with interest thereon, based on a note, accounts and drafts, which he supposed were correct at the time, but which he has since ascertained to be incorrect; as containing over-charges, compound interest, illegal commissions and items fraudulently introduced into the account. He alleges that he has shipped ninety-nine bales cotton to the defendant since the confession of judgment in his favor, which remains unaccounted

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for, leaving a balance due of five hundred seventy-nine dollars and twenty-seven cents. He prays for an injunction to restrain Smith from proceeding with his execution of said judgment until it be corrected, and an investigation of *matters set forth can be had.*

In his answer to interrogatories, Smith annexed an account, showing the sale and distribution of the proceeds of the cotton by the firm of Palmer Smith & Co., to which firm he belonged, and by which a balance of three hundred eighty-three dollars and ninety cents was due to Stafford, and which is credited on the judgment.

The plaintiff offered a receipt of Smith's, in evidence, to show that the judgment has been paid, which was objected to and referred by the court, as irrelevant; no allegation of payment being made in the petition.

The injunction was sustained for sixty-eight dollars and thirteen cents.

The defendant appealed.

Thomas, for plaintiff and appellee, contended that:

1. That the judgment enjoined was founded upon an erroneous statement of the original accounts between the parties, by omitting proper credits, making improper over-charges, &c., &c.

2. The judgment, although confessed by Stafford, can be opened, because it is founded in error, so as to have the error complained of, corrected, without attacking the whole judgment in an action of nullity.

PORTER, J., delivered the opinion of the court.

The petitioner alleges, that he confessed judgment in favor of the defendant, upon an account presented, which he believed to be correct, but that he has since discovered that several items of it were false and fraudulent. He further charges, that the defendant has issued an execution on the judgment so obtained, and is about to seize and sell

his property, and he prays for an injunction until the matters set forth in the petition can be investigated.

The parties went to trial in the court below on an issue formed by the general denial. The court made the injunction perpetual for the sum of sixty-eight dollars and thirteen cents.

The defendant appealed.

There is a plea of prescription, which requires to be examined before we can look into the other matters in contest.

We are of opinion this plea is sustained. The 613th article of the Code of Practice provides, that when a judgment has been obtained through fraud, the action must be brought within one year after the fraud has been discovered, or the *receipt* found. There is no proof on record, that the discovery of the alleged fraud was less than twelve months before the institution of the action, and this action was brought more than twelve months after the rendition of the judgment.

This case was attempted on the argument to be assimilated to that of *Paxton* vs. *Cobbs*, but the analogies between them are too remote, to permit us to apply the same rules in both. In the latter, the judgment of the court was made the basis of a new action, in which different things were claimed from those given by the first decree, and the defence of nullity was presented as an exception. Here, the first judgment is about to be carried into execution, and that execution can only be suspended by an action of nullity, if the grounds on which it is sought to be instituted are matters arising previous to the judgment being rendered. Such an action must be brought within one year. This construction is greatly strengthened by the declaration in the Code of Practice that, the nullities in judgments which arise from incompetency in the judge, or incapacity in the parties, are not prescribed so long as they are unexecuted; while, in those which proceed from fraud in one of the parties, the prescription is made to commence from the time the fraud is discovered. Thus suspending the prescription in the one

The prescription of one year applies to an action instituted to correct a former judgment, which it is alleged is erroneous, and some of the items composing it fraudulently charged; and if such an action be brought more than a year after the judg-

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case until the plaintiff attempts to execute the judgment, and declaring in the other, that it shall run upon a totally distinct consideration. *Code of Practice*, 612, 613. 2 *La. Rep.* 138.

ment, proof must be given that the fraud has been discovered within a year.

But in addition to the frauds alleged in relation to the judgment, there are charges in the petition of payments having been made since it was rendered, for which the plaintiff is entitled to a credit. As these relate to matters arising after payment, they are a proper subject of inquiry. On this head the allegation in the petition is, that ninety-nine bales of cotton were shipped to the defendant between the months of October, 1829, and April, 1830; and that there remained five hundred seventy-nine dollars and twenty-seven cents, for which he had not accounted.

Although a party is precluded from attacking a judgment on the ground of fraud or nullity, after the lapse of one year, yet, where the petition sets up payments and matters arising since the judgment complained of, they will be inquired into.

A bill of exceptions was taken by the plaintiff to the rejection by the court of a receipt of the defendant, for a large sum of money. The receipt is dated on the 24th January, 1832. As the petition claims the injunction on totally distinct grounds from that of any payment at that time, or in that way, we think the court did not err in rejecting it.

A receipt of a payment given since the institution of suit, and not claimed in an amended petition, will not, if directed to be admitted in evidence to prove the allegation of payment made in the petition, praying to enjoin further proceedings as an execution.

The defendant was interrogated whether the ninety-nine bales of cotton alluded to in the petition, had not been sent to him. He answered that the house to which he belonged, had received but ninety-five, and that the proceeds had been paid and distributed, at the request and in pursuance of the directions of the plaintiff. The account of that distribution is annexed to the answer, and shows a balance of three hundred eighty-three dollars and ninety cents, in favor of the defendant. The balance was subsequently credited on the judgment now sought to be enforced.

Where interest and commissions are charge in a balance account attacked as erroneous, proof of an agreement must be produced or the charge will be rejected.

We have examined that account, and we can discover no other errors in it, save a charge of interest at ten per cent., for which, nor for interest at any other rate, is there proof in writing; and a charge for commissions, in advancing cash. The charge appears to fall within the same principles on which we rejected a charge for acceptances, in the case

of *Millaudon* vs. *Arnaud*, decided at the last term of this court. These amount to forty dollars and sixty-six cents.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed, and it is further ordered and decreed, that the injunction granted in the case be perpetuated for the sum of forty dollars and sixty-six cents, the defendant paying costs in the court of the first instance, and the plaintiff those of appeal.